

PROCEDURES FOR REVIEW OF DISPUTED SUPERVISORY DETERMINATIONS

Introduction

I. Background.

The Federal Housing Finance Board (Finance Board) was established pursuant to the Federal Home Loan Bank Act, as amended, codified at 12 U.S.C. §§ 1421, et seq., (1994) (Bank Act). The Finance Board is an independent agency in the executive branch of the federal government. 12 U.S.C § 1422a(a). The Finance Board's primary duty is to ensure that the Federal Home Loan Banks (Banks) operate in a safe and sound manner. 12 U.S.C. § 1422a(s)(3)(A). Additionally, and consistent with that duty, the Finance Board supervises the Banks, ensures that they carry out their housing finance mission, and ensures that the Banks remain adequately capitalized. 12 U.S.C. § 1422a(s)(3)(B)(i)-(iii). The Finance Board is thus empowered to supervise the Banks and to "promulgate and enforce such regulations and orders as are necessary from time to time to carry out the provisions of" the Bank Act. 12 U.S.C. § 1422b(a)(1).

Under section 20 of the Bank Act, the Finance Board must require annual examinations and reports of condition of all Banks. 12 U.S.C. § 1440. Examiners appointed by the Finance Board to conduct the required examinations are subject to the same requirements, responsibilities, and penalties as are applicable to examiners under the National Bank Act and the Federal Reserve Act (bank examiners) and have the same powers and privileges as are vested in those bank examiners by law. *Id.* The responsibilities, powers and privileges of Finance Board examiners are co-extensive with those vested in bank examiners pursuant to section 5240 of the Revised Statutes, February 19, 1875, as amended (codified at 12 U.S.C.A. § 481). *Id.* Thus, Finance Board examiners "shall have power to make a thorough examination of all the affairs of [a Bank and its affiliates] and . . . to administer oaths and to examine any of the officers and agents thereof under oath... ." 12 U.S.C.A. § 481.

II. Powers and Duties of Examiners.

The Office of Supervision oversees the Banks to ensure that they operate in a financially safe and sound manner, are carrying out their housing and community and economic development finance mission and are in compliance with applicable statutes and regulations and Finance Board policies and orders.' In carrying out their oversight and examination duties, examiners may make findings of violations of statute, regulations or policies ("violation"), unsafe or unsound practices or conditions, or weaknesses in internal controls ("weakness") (collectively, "supervisory

See 12 C.F.R. § 900.14, as amended pursuant to Finance Board Resolution No. 96-92, dated December 11, 1996.

determinations;" see Definitions section I(K), (infra). Examiners also may make suggestions or recommendations as to practices or controls of a Bank that could be modified or improved to meet best banking practices ("suggestions"). Suggestions are not mandatory. The examiners may issue both supervisory determinations and suggestions in a report of examination or otherwise.

Supervisory determinations requiring corrective action may include the examiner's recommendations as to the specific corrective action required and a request for a plan and timetable for undertaking the required corrective action.

All supervisory determinations must be based on existing law, regulation or policy. Examiners may order compliance with, or cite a violation of, law, regulation or policy only if the conduct of the Bank clearly is not in compliance with or clearly is a violation of such law, regulation or policy. Examiners should refer any questions in this regard to the Office of General Counsel. Examiners also may make supervisory determinations that the Bank's conduct constitutes an unsafe or unsound practice or weakness.

From time to time a Bank may disagree with supervisory determinations or with the findings and conclusions upon which supervisory determinations are based ("disputed supervisory determination"). In the event that the staff of the Office of Supervision and the Bank are unable to resolve a disputed supervisory determination by voluntary agreement, outstanding supervisory issue(s) may exist. Bank staff are encouraged to maintain cooperative communication to resolve such disputes with Office of Supervision staff informally and expeditiously. The Finance Board expects that most disputes will be resolved in that manner.

III. Reasons for Adopting Procedures.

The Finance Board has determined it is in the interest of the Banks and the agency to establish procedures to provide for the review of disputed supervisory determinations, as defined herein, by the Board of Directors of the Finance Board.' The purpose of these procedures is to provide the

By way of comparison, section 309 of the Riegle Community Development and Regulatory Improvement Act of 1994, Pub. L. No. 103-325, 108 Stat. 2160, 2218-20 (Sept. 23, 1994) (to be codified at 12 U.S.C. § 4806), requires "each appropriate Federal banking agency" to establish an "independent intra-agency appellate process" for the review of "supervisory determinations," as defined in section 309(f)(1), when such disputes cannot be resolved informally at the staff level. Although the definition of "appropriate Federal banking agency" does not include the Finance Board see 12 U.S.C. § 1813(q), and the provisions of section 309 do not expressly apply to the Finance Board, the provisions are instructive. The procedures adopted by "each appropriate Federal banking agency" under section 309 ensure that an appeal of "supervisory determinations," defined as determinations relating to examination ratings, the adequacy of loan loss reserves or loan classifications, will be heard and decided expeditiously. Section 309 expressly excludes from the definition of supervisory determinations agency decisions to appoint a conservator or receiver, or a decision to take action pursuant to the corrective action provisions of the Federal Deposit Insurance Act, 12 U.S.C. § 1831o. 12 U.S.C. § 4806(f)(1). Also excluded are preliminary examination results and formal enforcement-related actions.

Banks with a process for the prompt review and resolution of disputes regarding examination findings and other supervisory determinations that cannot be resolved informally once efforts to do so have failed to produce a resolution. These procedures are adopted pursuant to 12 U.S.C. § 1422b(a)(1) and 12 C.F.R. § 900.50. These procedures are not applicable to routine requests for policy guidance outside of the examination process.

PROCEDURES FOR SEEKING REVIEW OF DISPUTED SUPERVISORY DETERMINATIONS

I. Definitions

As used in these procedures-

(A) Finance Board

The term Finance Board shall have the same meaning as the term “Board” defined in 12 U.S.C. § 1422(l).

(B) Bank

The term Bank shall have the same meaning as defined in 12 U.S.C. § 1422(2)(A).

(C) Bank System

The term Bank System shall have the same meaning as defined in 12 U.S.C. § 1422(2)(B).

(D) Chairperson

The term Chairperson shall have the same meaning as defined in 12 U.S.C. § 1422(10) and 12 C.F.R. § 900.11.

(E) Managing Director

The term Managing Director shall have the same meaning as the term Executive Director defined in 12 C.F.R. § 900.12.

(F) Office of Supervision

The term Office of Supervision shall have the same meaning as the term Examination Division defined in 12 C.F.R. § 900.14(c).

(G) Office of General Counsel

The term Office of General Counsel shall have the same meaning as defined in 12 C.F.R. § 900.15.

(H) Office of Policy

The term Office of Policy shall have the same meaning as defined in 12 C.F.R. § 900.13.

(I) Executive Secretariat

The term Executive Secretariat shall have the same meaning as defined in 12 C.F.R. § 900.12(b).

(J) Board of Directors

The term Board of Directors shall have the same meaning as defined in 12 C.F.R. § 900.10.

(K) Supervisory determinations

For purposes of these procedures, the term supervisory determination shall mean: (1) a finding of the Office of Supervision requiring mandatory action (e.g., unsafe and unsound practice or condition, weakness, or violation) set forth in a report of examination, order or directive; (2) an order or directive by the Office of Supervision requiring mandatory action concerning safety and soundness or compliance matters; or (3) a failure by the Office of Supervision, within sixty (60) days of a Bank's written request, to acknowledge in writing that the Office of Supervision will take no supervisory action with regard to an issue or set of circumstances presented by the Bank ("no action request").

(L) Report of Examination

The term report of examination shall mean any written report of examination produced by the Office of Supervision pursuant to 12 U.S.C. § 1440 or 12 C.F.R. § 900.14(c).

II. Responsibilities of Finance Board Offices.

A. Office of Supervision.

1. The Office of Supervision is charged with overseeing and examining the Banks to ensure their financial safety and soundness, compliance with law and regulations, accomplishment of the housing finance and community and economic development mission and adequate capitalization. Reports of examination and other supervisory determinations issued by the Office of Supervision generally will contain findings and suggestions, including findings requiring mandatory corrective action with regard to an unsafe and unsound practice or condition, weakness or violation ("supervisory findings"), the bases for such findings and suggestions ; a summary of outstanding issues ("outstanding issues"); and a summary of the Bank management's

responses as of the issue date of the report of examination or other supervisory determination. The board of directors of the Bank shall be advised of its responsibilities to respond to supervisory findings and outstanding issues raised in a report of examination (“examination issues”).

2. The Director of the Office of Supervision promptly shall provide copies of reports of examination or other supervisory determinations to the Managing Director for distribution to each member of the Board of Directors at the time the report of examination or other supervisory determination is provided to the board of directors of the Bank.

3. The Office of Supervision will track and evaluate the response of a Bank’s board of directors to reports of examination and other supervisory determinations, will monitor the status of supervisory and examination issues, and will report periodically to the Managing Director and the Board of Directors on such matters.

4. The Office of Supervision shall advise the Managing Director on any disputed supervisory determination, and make recommendations concerning the referral of such matters to the Board of Directors for review and determination in accordance with these procedures.

5. As circumstances warrant, the Office of Supervision shall notify the Managing Director of serious weaknesses that have been identified in the course of an examination prior to issuing a report of examination to a Bank. The Managing Director, in consultation with the Chairperson and the Office of Supervision, shall notify the Board of Directors of such matters.

B. Office of the Managing Director.

1. The Managing Director shall review reports of examinations, and any other reports regarding supervisory determinations provided by the Office of Supervision, and promptly transmit such reports to the members of the Board of Directors.

2. The Managing Director, upon receipt of a petition for review, promptly shall transmit such petition to the members of the Board of Directors.

3. The Managing Director, in consultation with the Office of Supervision and the Chairperson, shall review a Bank’s petition for review filed pursuant to these procedures and undertake such actions as are provided for in section III.B.3. of these procedures to ensure that the matters presented in the petition are ripe for consideration by the Board of Directors.

4. The Managing Director may waive any of the requirements of or deadlines contained in these procedures as she/he deems appropriate and in the best interest of the Finance Board or any Bank or for good cause shown. A waiver of any provision(s) shall be limited to such provision(s) as stated and shall not be considered to be a general waiver or waiver of any other provision(s). The Managing Director shall notify the Board of Directors of any waiver granted.

5. The Managing Director may determine that additional information is needed before a decision can be reached as to whether the examination issue(s) or other supervisory determinations raised in the petition for review are ripe for the Board of Directors' consideration. The members of the Board of Directors may request that the Managing Director request further information from the Bank. The Managing Director may refer the matter to staff for further development or direct staff to request further information from the Bank in writing. (Information Request).

6. The Managing Director, in consultation with the Office of Supervision, Chairperson, and members of the Board of Directors, may determine that all information necessary for the Board of Directors to review and make a reasoned determination under these procedures has been presented and may deem the record to be complete and the matter ripe for review and action by the Board of Directors. The Managing Director shall ensure that the members of the Board of Directors are promptly provided with the complete record of the petition for review.

C. Office of the Executive Secretary.

1. The Executive Secretary, in consultation with the Managing Director and the Office of General Counsel, shall implement notice and tracking procedures for the handling and disposition of such petitions for review as may be received at the Finance Board from time to time (tracking procedures).

2. The Executive Secretary's tracking procedures shall provide for the logging in and prompt transmittal of petitions for review to the Managing Director and notice of the receipt of such petitions to the Office of Supervision, any additional program office(s) and the Office of General Counsel, as needed.

3. The Executive Secretary shall provide written notice(s) to a Bank that files a petition for review concerning receipt of such petitions and other notices as provided in these procedures.

II. Federal Home Loan Banks.

A. A Bank shall work with the Office of Supervision in an effort to reach a resolution of any disagreement regarding a supervisory determination

B. A Bank seeking review by the Board of Directors of a disputed supervisory determination shall file a petition for review in the manner prescribed in the Petition Process, below. Failure to conform a petition for review to these requirements may result in unavoidable delay.

C. A Bank shall promptly and fully respond to any Information Request.

III. The Petition Process.

A. Procedures to be Followed by the Banks.

1. A Bank shall file a petition for review with the Executive Secretary on or before sixty (60) calendar days from the date of the supervisory determination.
2. A petition for review shall include:
 - (a) a brief statement of the issue(s);
 - (b) a statement of the background circumstances, including the relevant facts, relevant supervisory determination, responses of the Bank's management and board of directors; other pertinent developments, including a concise statement of the points of agreement and disagreement between the Bank and the Office of Supervision as of the petition date;
 - (c) a summary of the steps taken to date by the Bank to resolve the issue(s) informally, or, in cases involving safety and soundness or compliance issues, a summary of any actions taken by the Bank in the interim to implement corrective action;
 - (d) the Bank's argument in support of its position, including citation to any supporting legal opinions, policy statements or other relevant precedent and supporting documentation, if any;
 - (e) a statement of the action or determination requested; and
 - (f) any non-duplicative, relevant supporting documentation. (Voluminous submissions are discouraged; if necessary, the terms of such submissions shall be determined in consultation with Finance Board staff)
3. The Bank's petition for review may contain a request that Bank staff or an agent of the Bank be permitted to make a personal appearance before the Board of Directors at any meeting convened to consider the petition pursuant to these procedures (request to appear). A request to appear must be accompanied by a statement of the reasons a written presentation would not suffice. The statement must specifically identify any questions of fact that are in dispute, summarize the evidence that would be presented at the meeting, identify all fact witnesses the Bank expects to call and examine, if any, and state the substance of their anticipated testimony.
4. The Bank's petition for review shall be accompanied by a resolution of the Bank's board of directors concurring in the substance of the petition and authorizing the filing of the petition for review.

5. Upon good cause shown, the Managing Director may grant permission to a Bank to submit supplemental written information pertaining to a Bank's petition for review.

6. No later than twenty (20) calendar days from the date of any Information Request made by the Finance Board, the Bank shall provide to the Executive Secretary any and all such information requested.

B. Procedures to be Followed by the Finance Board.

1. The Executive Secretary shall send a written Notice of Receipt of Petition to the Bank not later than three (3) work days following receipt of a petition for review and shall immediately forward the petition for review to the Managing Director.

2. The Executive Secretary also promptly shall forward a copy of the petition for review to the Director of the Office of Supervision.

3. In accordance with the applicable delegated authority and subject to the provisions stated in these procedures, the Managing Director shall have thirty (30) calendar days from the date the petition for review was received in the Office of the Executive Secretary in which to review such petitions for compliance with the requirements set forth in these procedures. Upon completion of his or her review, the Managing Director shall either:

(a) reject petitions that are found not to be in compliance with the requirements;

(b) afford the Bank submitting a petition that is not in compliance with these procedures a reasonable opportunity to cure such defects as may be noted or request additional information from the Bank filing the petition (Information Request) or any appropriate office or division of the Finance Board; or

(c) schedule a meeting of the Board of Directors for action.

4. Within thirty (30) calendar days of receipt of a petition that has been determined by the Managing Director to be in compliance with these procedures and complete, the Managing Director shall issue through the Executive Secretary to the Bank a written notice of the date, time and place of the meeting of the Board of Directors for which consideration of the petition for review shall be scheduled, the issues accepted for review by the Board of Directors, and a decision as to any request to appear (Notice of Meeting). Where the Managing Director has scheduled a meeting of the Board of Directors and the Bank's request to appear is granted, the Executive Secretary additionally shall attach to the Notice of Meeting a copy of these procedures with an instruction that they are controlling as to the conduct of the meeting.

5. The Notice of Meeting shall provide thirty (30) calendar days notice of said meeting unless otherwise stated.

6. The offices of the Finance Board, including the Office of Supervision and the Office of General Counsel, as appropriate, promptly shall provide any requested information, comments, assistance, or support to the Managing Director, or other action required pursuant to these procedures to assist the Board of Directors in their consideration of a petition for review.

IV. Provisions to Regulate the Course of the Meeting of the Board of Directors.

A. Provide Full and Fair Opportunity to Be Heard.

A Bank's petition for review may be considered in a regularly scheduled meeting of the Board of Directors or a meeting convened specifically for the purpose of considering a petition for review (meeting). The Board of Director's meeting is intended to give the Bank a full and fair opportunity to be heard on the issues raised in the petition for review. The meeting shall be conducted so as to permit an expeditious presentation of such issues.

B. Chair of the Meeting.

The Chairperson of the Board of Directors, or his/her designee member of the Board of Directors (Chair), shall preside over a meeting of the Board of Directors convened under these procedures.

C. Meeting May Be Closed.

Notwithstanding any other provision in these procedures, a Bank (in its petition for review) or a member of the Board of Directors may request that the meeting proceed as a closed meeting. Such requests shall be processed in accordance with 12 C.F.R. §§ 906.4 and 906.5.

D. Presentation of the Issues.

1. Finance Board staff and the Bank's staff may agree as to stipulations of law or fact and present such stipulations at the meeting. The Board of Directors may accept in whole or in part such stipulations, and they shall be made a part of the record of the proceeding.

2. Unless otherwise prescribed by the Chair, a Bank/petitioner first shall present its argument to the Board of Directors followed by the Office of Supervision. The Chair shall determine the order of presentation of the issues and of the evidence and other procedural matters at the meeting.

3. Transcripts of the proceedings shall be governed by 12 C.F.R. § 906.5(c). The petition for review and all supporting documentation shall be made a part of the transcript. All submissions by the Bank shall be signed by an authorized officer or representative of the Bank.

4. Within sixty (60) calendar days or such additional time as the Board of Directors may reasonably require following the meeting, with the assistance of Finance Board staff as

appropriate, the Board of Directors shall render a decision on the issues presented in the petition for review (“decision of the Board of Directors”).

5. The Executive Secretary shall forward the decision of the Board of Directors to the Bank, with a copy to the Director of the Office of Supervision.

V. General Provisions Governing These Procedures.

A. Disposition on the Written Record.

The Board of Directors may determine the issues presented and may render a decision on the examination issue(s) or other supervisory determination(s) raised in the petition based solely on the written record before the Board of Directors (summary decision). A summary decision shall be in writing, promptly provided to the Bank and the Director of Supervision, and shall be determinative as to such issues as may be presented in the Bank’s petition for review. A summary decision shall be final.

B. Withdrawal of Petition for Review.

At any time during the course of proceedings under these procedures, an authorized representative of a Bank having submitted a petition for review may make a written request directed to the Office of the Executive Secretary to withdraw the petition for review. Unless otherwise agreed, withdrawal of a petition for review shall not be deemed to foreclose a Bank from resubmitting a petition for review on the same or similar issues within the applicable time as specified by these procedures (i.e., such withdrawal may be “without prejudice”). The Board of Directors promptly shall be notified of a withdrawal of a petition for review under these procedures.

C. Settlement of Issues Raised in a Petition for Review.

Settlement discussions between the Office of Supervision and Bank staff are expressly encouraged. At any time during the course of proceedings under these procedures, an authorized representative of a Bank having submitted a petition for review may enter into an agreement with the Office of Supervision disposing of some or all of the issues presented in the petition for review (“Settlement Agreement”). The Director of the Office of Supervision may enter into a proposed Settlement Agreement with the advice and consent of the Managing Director. No proposed Settlement Agreement shall be final until approved by the Board of Directors.

The Board of Directors promptly shall be notified of any proposed Settlement Agreement. Within 30 days, the Board of Directors shall consider the proposed Settlement Agreement.

An approved Settlement Agreement shall be deemed final and binding as to both parties. At the time a proposed Settlement Agreement becomes final, a Bank’s previously filed petition for review shall be deemed withdrawn, all issues raised therein shall be deemed resolved, and the

Bank shall be estopped subsequently from raising objection to those issues or to the terms of the Settlement Agreement.

If the Board of Directors disapproves a proposed Settlement Agreement or fails to approve a proposed Settlement Agreement within 30 days, the proposed Settlement Agreement shall be null and void and the Bank's previously filed petition for review shall be set for a meeting of the Board of Directors in accordance with these procedures.

D. No Rights Created; No Prohibition on Actions of the Finance Board.

Nothing in these procedures shall be deemed to create any substantive or discovery rights in any party. These procedures shall not preclude any proceeding under any section of the laws or regulations applicable to the Finance Board. Nothing in these procedures limits in any manner the right of the Finance Board to conduct any examination or inspection of any Bank, or to take any action with respect to a Bank, or its directors, officers, employees or agents, otherwise authorized by law.

E. Exhaustion Requirement.

A Bank seeking review by the Board of Directors with regard to any supervisory determination shall follow these procedures as a prerequisite to seeking such review. Failure to do so shall be deemed to be a failure to exhaust the available administrative remedies.

F. Improper Conduct Prohibited.

These procedures are intended to provide a process for the fair and expeditious presentation of supervisory determinations. No party shall, by act or omission, unduly burden or frustrate the efforts of the Board of Directors to carry out its duties under the laws and regulations of the Finance Board. A Bank shall confine its communications with the Board of Directors, or any individual member thereof, concerning issues raised in a pending petition for review, to written communications for inclusion in the record of the proceeding under these procedures, and provide a copy to the Office of the Executive Secretary.

G. Decisions of the Board of Directors and Summary Decisions.

The Bank shall be bound by the terms and conditions of the decision of the Board of Directors or summary decision for purposes of the issue(s) presented in the petition for review, and the decision of the Board of Directors or summary decision shall be final.

H. Costs.

A Bank is encouraged to contain costs associated with the preparation and filing of petitions for review and related personal appearances, if any, at any meeting held by the Board of Directors under these procedures. The Bank shall be solely responsible for all costs associated with any such petitions and appearances.

I. No Stay.

All supervisory determinations of the Office of Supervision directed to a Bank shall remain in full force and effect during the pendency of any proceedings under these procedures. The pendency of a petition for review shall not operate or be deemed to operate as a suspension of a Bank's obligation under the law promptly to take corrective action as required by any supervisory determination, except as the Bank may be otherwise directed by order of the Board of Directors.

J. Procedures are Exclusive.

All disputes regarding supervisory determinations are to be raised exclusively through these procedures. These procedures are not applicable to routine requests for policy guidance outside of the examination process. These procedures shall not apply to proceedings under the Bank Act to suspend or remove for cause a director, officer, employee or agent of a Bank or joint office of the Banks pursuant to 12 U.S.C. § 1422b(a)(2).

VI. Further Information.

For further information on these procedures contact the Office of the General Counsel, Federal Housing Finance Board, 1777 F Street, N.W., Washington, D.C. 20006; telephone: 202-408-2510.